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Supreme Court of the United States.

OCTOBER TERM, 1930.

No. 65

PERCIVAL E. MAGEE, PETITIONER,

v.

THE UNITED STATES, RESPONDENT.

Brief for Petitioner.

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Supreme Court of the United States.

OCTOBER TERM, 1930.

No. 65

PERCIVAL E. MAGEE, PETITIONER,

v.

THE UNITED STATES, RESPONDENT.

BRIEF FOR PETITIONER.

STATEMENT OF THE CASE.

This is a suit brought by the petitioner in the Court of Claims to recover additional income tax for the calendar year 1916 in the amount of $47,871.03, collected after the expiration of the five year period for collection prescribed by Section 250(d) of the Revenue Act of 1921, c. 136, 42 Stat. 227, 265. To the petitioner's cause of action the respondent relied on Section 611 of the Revenue Act of 1928, c. 852, 45 Stat. 791, 875, and the Court of Claims held (R. 12 et. seq.) that the provisions of Section 611 are to be construed to defeat the right of the petitioner to sue and as so construed the provisions of the section are constitutional (37 F. (2d) 763).

This Court granted a writ of certiorari (50 S. Ct. 407) to review the decision of the court below and in granting the writ limited it to the question of the effect and validity of Section 611 of the Revenue Act of 1928.

Unless otherwise indicated the italics of this brief are those of the petitioner.

I.

Opinion of the Court Below

The opinion of the court below was rendered by the Court of Claims on January 20, 1930, in the case of this petitioner against the United States, No. J-675 on the records of that court. The opinion has been reported in 37 F. (2d) 763, and is a part of the record on this appeal (R. 12–18).

II.

Jurisdiction.

This Court has heretofore granted a writ of certiorari under the provisions of Section 3(b) of the Act of February 13, 1925 (45 Stat. 936).

The date of the decree of the Court of Claims sought to be reversed is January 20, 1930 (R. 18). The petition applying for the writ of certiorari was filed on March 25, 1930, and was granted May 19, 1930.

III.

Statement of the Facts.

The petitioner filed his income tax return for the calendar year 1916 on February 27, 1917, and reported therein a tax in the amount of $10,419.35.

During the month of October, 1921, the Commissioner of Internal Revenue assessed additional tax in the amount of $64,982.12. The petitioner on November 15, 1921, filed a claim in abatement in the said amount of $64,982.12.

On receipt of a claim in abatement, it was common practice to hold up the collection of an additional assessment. The collector of internal revenue acted in accordance with this practice and, in the exercise of his discretion, actually held up the collection of the additional assessment and forwarded the claim to the Commissioner of Internal Revenue in due course.

On February 12, 1924, the Commissioner of Internal Revenue allowed the claim in abatement in the amount of $21,952.28 and rejected it in the amount of $43,029.84. On May 13, 1924,

the collector made demand on the petitioner for the payment of the sum of $43,029.84, which said sum, together with interest thereon in the amount of $4,841.19, was discharged by payments made on May 23, 1924, June 17, 1924, and July 11, 1925 (R. 10, 11).

IV.

Specification of Errors.

The errors of the Court of Claims with reference to the effect and validity of Section 611 of the Revenue Act of 1928 and which the petitioner urges as grounds for the reversal of the decision are:

1. The court below erred in holding that the consent of the United States to be sued for the recovery of a tax illegally collected is conferred by Section 607 of the Revenue Act of 1928 and that the provisions of Section 611 of the act deprive the petitioner of the right to sue.

2. The court below erred in not holding that the consent of the United States to be sued for the recovery of a tax illegally collected is conferred by Section 145 of the Judicial Code and Section 3226 of the Revised Statutes.

3. The court below erred in not holding that Section 611 does not apply because no tax was assessed within the applicable limitation period, no legal claim in abatement was filed, collection of no part of the tax was stayed, and payment was not voluntary.

4. The court below erred in not holding that to the extent that Section 611 may be construed to limit the authority of the Commissioner of Internal Revenue to refund the tax illegally collected or the right of the petitioner to recover it, the section has been repealed and superseded by the later act of Congress, Section 3220 of the Revised Statutes, as amended.

5. The court below erred in not holding that to construe Section 611 of the Revenue Act of 1928 to apply to this case to deprive the petitioner of the amount of the tax illegally col-

lected from him and of his right to sue to recover it would cause the section to violate the Fifth Amendment to the Constitution.

6. The court below erred in dismissing the petition.

V.

The Questions Presented.

The questions presented in the application for the writ are, is Section 611 of the Revenue Act of 1928 (45 Stat. 791, 875) to be construed to take from the petitioner his right and title to an amount illegally collected from him as a tax, after the expiration of the statutory period for collection, and to deprive him of the right to recover it; and, if to be so construed, does Section 611 violate the Fifth Amendment to the Constitution?

The petitioner submits, however, that a full consideration of these questions is not necessary to a decision of the case for the reason that, to the extent that it may be construed to apply to this case, Section 611 has been repealed and superseded by the later act of Congress in Section 3220, as amended, which has come to counsel's attention since the application for the writ.

VI.

The Argument

Summary of Argument.

A. **SECTION 611 DOES NOT APPLY.**

1. Section 611 is merely an exception to Section 607 of the Revenue Act of 1928 and is one of the mandatory administrative provisions which make it the duty of the Commissioner of Internal Revenue to credit or refund an overpayment and the section is not a limitation on the authority of the Commissioner to remit or pay back a tax illegally collected nor is the section a limitation on the petitioner's right to sue.

2. No internal-revenue tax was assessed "within the period of limitation properly applicable thereto," no legal claim in abatement was filed, the collection of no part of the tax was stayed and payment was not voluntarily made.

B. TO THE EXTENT THAT IT MAY BE CONSTRUED TO APPLY SECTION 611 HAS BEEN REPEALED.

To the extent that its terms or provisions may be construed to limit or to in any manner affect the authority of the Commissioner to refund or pay back or the right of the petitioner to recover a tax illegally collected, Section 611 has been repealed and superseded by the later act of Congress in Section 3220 of the Revised Statutes as amended and reenacted May 29, 1928.

C. SECTION 611, IF NOT REPEALED AND IF TO BE CONSTRUED TO APPLY, WOULD BE UNCONSTITUTIONAL.

The petitioner would be deprived of his property without due process of law and would amount to the taking of property without compensation in violation of the Fifth Amendment to the Constitution.

POINT A.

SECTION 611 DOES NOT APPLY

Section 611 is merely an exception to Section 607:

Section 611 of the Revenue Act of 1928 provides that the payment of an internal-revenue tax, under certain conditions, "shall not be considered as an overpayment under the provisions of Section 607, relating to payments made after the expiration of the period of limitation on assessment and collection." Section 607, to which reference is made in Section 611, provides that a tax paid after the expiration of the period of limitation "shall be *considered* an overpayment and shall be credited or refunded."

That Section 611 is merely an exception or limitation to the provisions of Section 607 is, the petitioner submits, too clear for argument. Section 611 can have application only in the event it is held that the petitioner, in order to recover, must rely on the provisions of Section 607. The petitioner filed claim for refund under Section 3220 of the Revised Statutes and brought suit under the provisions of Section 145 of the

Judicial Code and Section 3226 of the Revised Statutes and does not rely on the provisions of Section 607 (*United States* v. *Emery, Bird, Thayer Realty Company*, 237 U. S. 28, 35 S. Ct. 499). The provisions of Section 611 do therefore not apply.

Sections 607 and 611 merely modify provisions in prior acts.

Congress provided that the Revenue Act of 1928 should apply only to the year 1928 and succeeding years and that taxes for prior years should not be affected *except as modified* by the provisions of the act. This appears in Section 1 of Title I (45 Stat. 795) which reads:

> "The provisions of this title shall apply only to the taxable year 1928 and succeeding taxable years. Income, war-profits, and excess-profits taxes for taxable years preceding the taxable year 1928 shall not be affected by the provisions of this title, but shall remain subject to the applicable provisions of prior revenue Acts, *except as such provisions are modified by Titles* III, IV, *and* V *of this Act* or by legislation enacted subsequent to this Act."

Sections 607 and 611 appear in Title IV—Administrative Provisions—(45 Stat. 874, 875) and must be construed, in accordance with Section 1, to *modify* "*the applicable provisions of prior revenue Acts.*" Sections 607 and 611 are, in fact, not full and complete in themselves. Section 607 merely modifies the definitions of an excess payment found in Section 252 of the Revenue Acts of 1918 and 1921 (42 Stat. 268) and of an overpayment found in Section 272 of the Revenue Acts of 1924 (43 Stat. 296), and 1926 (44 Stat. 55), *by adding thereto* the amount of the tax paid after the expiration of the statutory period for collection. This is explained by the Ways and Means Committee of the House, 70th Congress, First Session, Report No. 2, at page 33:

> "Section 607 provides that regardless of the correct tax liability any payment shall be an overpayment if made after the period of limitation on assessment * * * or after the expiration of the period of limitation on collection by distraint or court proceedings * * *. *An overpayment*

under section 607 is to be credited or refunded the same as any other payment."

The provisions modified are those relating to the credit or refund of an overpayment and have no relation to the refund of a tax illegally collected:

Throughout the several revenue acts beginning with Section 252 of the Revenue Act of 1918 and continuing through Section 322 of the Revenue Act of 1928 (45 Stat. 861), Congress has made it the duty of the Commissioner of Internal Revenue to credit or refund excess payments or overpayments. Section 252 of the Revenue Act of 1918, in which an excess payment is referred to, reads in part:

> "That if, upon an examination of any return * * * it appears that an amount of income, war-profits or excess-profits tax, has been paid in excess of that properly due, then, notwithstanding the provisions of section 3228 of the Revised Statutes, *the amount of the excess shall be credited* against any income, war-profits, or excess-profits taxes, or installment thereof, then due from the taxpayer under any other return *and any balance of such excess shall be immediately refunded* to the taxpayer: * * *"

Congress in the enactment of the Revenue Act of 1921 made no material change in Section 252 of the Revenue Act of 1918 nor is there any material change in the amendment to Section 252 of the Revenue Act of 1921 by the Act of March 4, 1923. In the enactment of the Revenue Act of 1924, Congress made a slight change in terminology and referred to overpayments instead of excess payments. Section 272 of the Revenue Act of 1924 entitled "Overpayments" reads in part:

> "* * * If the amount already paid, whether or not on the basis of installments, exceeds the amount determined to be the correct amount of the tax, the excess shall be credited or refunded as provided in section 281."

Section 281 (43 Stat. 301), which is referred to in Section 272 above, is entitled "Credits and Refunds" and subparagraph (a) reads in part:

> "Where there has been an overpayment * * * the amount of such overpayment shall be credited against any income, war-profits or excess-profits tax or installment thereof then due from the taxpayer, and any balance of such excess shall be refunded immediately to the taxpayer."

The regulations of the Treasury Department promulgated pursuant to the provisions of Section 252 of the Revenue Acts of 1918 and 1921, and Sections 272 and 281 of the Revenue Act of 1924, disclose that these sections have been construed to apply to the Commissioner of Internal Revenue in the crediting or refunding of overpayments. Article 1221 of Regulations 65 promulgated for the enforcement of Section 272 of the Revenue Act of 1924 reads:

> "OVERPAYMENTS—If upon examination of the return *the Commissioner finds* that the taxpayer has paid as an installment an amount greater than the correct amount of such installment, the excess of such payment over the correct amount of such installment *shall be credited* against any unpaid installments. If the amount already paid exceeds the amount determined to be the correct amount of the tax, the excess shall be credited against any other income, war-profits, or excess-profits tax or installment due from the taxpayer, or, if there is no such tax or installment against which such credit may be made, the excess shall be refunded in accordance with the provisions of section 281 of the statute."

The Revenue Act of 1926 is similar to the Revenue Act of 1924 and Congress in Sections 272 and 284 (44 Stat. 66) again referred to overpayments and credits and refunds. Article 1301 of Regulations 69 promulgated for the enforcement of the Revenue Act of 1926 reads:

> "Authority for the credit and refund of any overpayment * * * is contained in Section 284."

In the Revenue Act of 1926 Congress, however, added Section 1106(a) (44 Stat. 113) which reads in part:

> "The bar of the statute of limitations against the United States in respect of any internal-revenue tax shall not only

> operate to bar the remedy but shall extinguish the liability; *but no credit or refund in respect of such tax shall be allowed unless the taxpayer has overpaid the tax.* * * *"

The provisions of the several acts which make it the duty of the Commissioner of Internal Revenue to credit an overpayment or to refund any remaining balance are purely administrative and mandatory and are included in the several acts along with other provisions relating to *the audit of the returns* and the making of assessments. These are purely routine duties which Congress has prescribed that the Commissioner *shall* perform. The provisions of the statutes have application to such duties only and have no bearing on the authority of the Commissioner to pay back a tax illegally collected nor on the right of a taxpayer to recover a tax so collected. *Fox* v. *Edwards*, 287 Fed. 669.

The provisions of Section 1106(a) of the Revenue Act of 1926, that "no credit or refund * * * shall be allowed unless the taxpayer has overpaid the tax" was considered in *Ellay Company* v. *Bowers*, 25 F. (2d) 637, certiorari denied, 48 S. Ct. 601, after the enactment of Section 611 of the Revenue Act of 1928, and Judge Manton of the United States Circuit Court of Appeals for the Second Circuit stated:

> "* * * Nor does 1106(a) of the Act of 1926 render uncertain the right of the taxpayer to recover the tax after payment where the bar of the statute has set in. The phrase of the statute 'but no credit or refund in respect of such tax shall be allowed unless the taxpayer has overpaid the tax,' must be read in the light of the other provisions of the same section. *That clause in no wise affects the right of the taxpayer to recover in appropriate suit after payment.*"

Separate and distinct from the provisions in the several revenue acts relating to the audit of returns and credits or refunds of overpayments, Congress has in Section 3220 of the Revised Statutes, at different times amended, authorized the Commissioner, subject to regulations prescribed by the Secretary of the Treasury, to remit, refund and pay back all taxes erroneously or illegally assessed or collected.

The provisions of the several revenue acts and of the revised statutes are to be read to mean that Congress has made separate provisions for the crediting or refunding of an overpayment and for the paying back of a tax erroneously or illegally assessed or collected. In the provisions of the revenue acts the Commissioner is *directed* to make the credit or refund, while in the Revised Statutes he is *authorized* to pay back, under regulations prescribed by the Secretary of the Treasury, a tax erroneously or illegally assessed or collected.

In the regulations promulgated by the Secretary of the Treasury for the enforcement of the several revenue acts, provisions are made for the paying back of taxes erroneously or illegally assessed or collected. These provisions appear in Article 1031 of Regulations 45, Article 1031 of Regulations 62, Article 1031 of Regulations 65, and Article 1301 of Regulations 69. In Regulations 69 the distinction between the duty to credit or refund an overpayment and the authority to pay back a tax erroneously or illegally assessed or collected is recognized by the following provision in Article 1301:

> "Authority for the credit and refund of any overpayment of any * * * tax * * * is contained in section 284. General authority for the remitting or refunding of taxes erroneously or illegally assessed or collected is found in section 3220 of the Revised Statutes * * *."

The petitioner submits that the provisions of Sections 607 and 611 of the Revenue Act of 1928 modify the provisions of Sections 272 and 284 of the Revenue Act of 1926 and their full force and effect is that Section 607 enlarges the definition of an overpayment to include a tax collected after the bar of the statute of limitations and that Section 611 merely limits the definition in 607 by taking from it a tax paid where an abatement claim was filed under certain conditions. The provisions of Sections 607 and 611 can not be construed to in any way modify the provisions of Section 3220 of the Revised Statutes, as amended, and do not in any sense limit the authority of the Commissioner of Internal Revenue to pay back a tax collected after the bar of the statute of limitations.

The courts have no authority to take the necessary steps to make a credit of an overpayment for one year to a tax due for another. The courts are not prepared to audit the returns for the several years. Further, the making of the credit requires the assessment of a tax for the year to which credited. The making of an assessment, like the audit of the return, is a purely administrative procedure which the courts have no authority to perform. The Commissioner of Internal Revenue alone can audit and examine a return, make an assessment of a deficiency and credit a tax paid for one year to another. The petitioner submits that Section 607 must therefore be construed to apply solely to the Commissioner in making credits or refunds of overpayments.

Sections 607 and 611 are not to be construed to affect the right of the petitioner to sue:

If the provisions of Sections 607 and 611 are not to be construed to limit the authority of the Commissioner of Internal Revenue under the provisions of Section 3220 of the Revised Statutes, as amended, to refund or pay back a tax illegally collected, the provisions of the acts are certainly not to be construed to in any way affect or limit the right of the petitioner to sue.

The jurisdiction of the Court of Claims is conferred by Section 145 of the Judicial Code and Section 3226 of the Revised Statutes, neither of which have been repealed or amended. As a prerequisite to the filing of his suit in the Court of Claims the petitioner duly filed with the Commissioner of Internal Revenue a claim for refund as provided by Section 3220 of the Revised Statutes and within the time prescribed by Section 3228 of the Revised Statutes. See *Rock Island, etc. R. Co.* v. *United States*, 54 Ct. Cl. 22, affirmed 254 U. S. 141, 41 S. Ct. 55. That Congress did not intend the provisions of Sections 607 and 611 to apply to the right of the petitioner to sue or to the jurisdiction of the court to entertain a suit clearly appears from the terms and provisions of the sections which can not be construed to have application to the courts.

Had Congress intended Section 611 to apply to defeat the

right of the petitioner to sue it would have provided as it did in Section 606 "* * * in any suit * * *" and in Section 284(d) of the Revenue Act of 1926 "* * * no suit * * * shall be instituted in any court * * *."

Congress by using the same terms in Sections 607 and 611 adopted the construction given mandatory administrative provisions in prior acts:

The rule of statutory construction that, where Congress enacts a statute and uses the same or similar terms and provisions that it had used in a prior statute which had received a uniform construction by the courts and by the departments the same interpretation is to be given the subsequent statute, has application to Sections 607 and 611 and they are to be construed to have the same meaning as the provisions of the prior revenue acts relating to overpayments, credits and refunds.

When Congress enacted the Revenue Act of 1928, it was aware of the fact that in the prior acts it had used the words "overpayment," "credited," and "refunded" to define the duties of the Commissioner of Internal Revenue. Congress was aware also of the construction which had uniformly been placed on the prior acts by the Treasury Department and by the courts, and the provisions of the Revenue Act of 1928 must, therefore, be construed with reference to the meaning given by Congress to the terms used in prior acts and the meaning given them in the construction of the prior acts by the Treasury Department and by the courts.

There is certainly no reason to suppose that for the first time in the Revenue Act of 1928, Congress made a clear departure from its legislative policy and intended the words "overpayment," "credited" and "refunded" to have an entirely different meaning from that given them in the prior acts or in the construction given prior acts. The rule of statutory construction that applies here is well stated in 36 Cyc. 1153 as follows:

> "Where a statute that has been construed by the courts has been reenacted in the same, or substantially the same terms, the legislature is presumed to have been familiar

> with its construction, and to have adopted it as a part of the law, unless it expressly provides for a different construction. So where words or phrases employed in a new statute have been construed by the courts to have been used in a particular sense in a previous statute on the same subject, or one analogous to it, they are presumed, in the absence of a clearly expressed intent to the contrary, to be used in the same sense, in the new statute as in the previous statute. These rules are also extended to statutes and parts of statutes that have been reenacted after having received a practical construction by the legislative or executive departments of the government."

The petitioner submits that, since Congress used the same terms it had used in prior acts to refer to matters of routine in the office of the Commissioner of Internal Revenue, the same construction must be given to Sections 607 and 611 of the subsequent act. Further, Congress in Section 322 of the Revenue Act of 1928, with reference to the tax for the year 1928, reenacted the provisions of Sections 252 and 272 of the prior acts.

Sections 607 and 611 are substitutes for 1106(a) of the Revenue Act of 1926:

The thing that Congress was concerned with in the enactment of these sections of the Revenue Act of 1928 was the *duty of the Commissioner of Internal Revenue* to make a refund of a tax collected after the limitation period. The provision in Section 1106(a) that no "credit or refund * * * shall be allowed unless the taxpayer has overpaid the tax" was construed by the Commissioner as a limitation on the authority that he otherwise would have had under the provisions of Section 3220 of the Revised Statutes, as then in force, to make such refund.

During the fall of 1927 the Commissioner of Internal Revenue issued a ruling I. T. 2382, C. B. VI-2—102 which reads:

> "Many inquiries are being received both from within and without the Bureau as to *the action which the Bureau should take in making refunds as a result of the decision of the Supreme Court in the case of Bowers* v. *New York & Albany Lighterage Co.*

"Great uncertainty exists as to the extent and application of the decision of the Supreme Court. It has been suggested that the New York & Albany Lighterage Co. decision may have no application to cases where bonds were filed or where claims in abatement were filed, and that, in view of section 1106 of the Revenue Act of 1926, *the decision should be limited to refunds resulting from court decisions and has no application to refunds by the Commissioner.* Furthermore, section 1106 was not raised in the Albany Lighterage Co. case and was not considered in connection with the confession of error made by the Government in the Toxaway Mills case before the Supreme Court (47 S. Ct. 471). The subsequent action of the Court of Claims raises grave doubt as to the application of the Albany Lighterage Co. decision to other cases in view of section 1106.

In view of the great uncertainty as to the whole matter, it is believed that no action toward making refunds should be taken by the Bureau in reliance upon the Albany Lighterage Co. decision unless and until the situation is clarified by further court decisions or by legislative action. The problem is already under consideration by the Joint Committee on Internal Revenue Taxation, and it will be presented to the Congress as soon as it convenes for such action toward a clarification of the situation as it deems proper."

In order to clarify the *duty* and *authority* of the Commissioner of Internal Revenue and to instruct him what to do with amounts that had been paid him by taxpayers after the running of the statute, Congress repealed Section 1106(a) as of February 26, 1926, and enacted as a substitute for Section 1106(a) Sections 607, 611 and other related sections of the Revenue Act of 1928, and amended Section 3229 of the Revised Statutes, Act May 29, 1928, c. 901, Sec. 3, 45 Stat. 996, entitled "An Act to discontinue certain reports now required by law to be made to Congress.

Section 3226 of the Revised Statutes has not been repealed or amended:

Congress has permitted Section 1113(a) of the Revenue Act

of 1926 (44 Stat. 116), Section 3226 of the Revised Statutes, to remain in force and without amendment. Section 1113(a) reads:

> "Section 3226 of the Revised Statutes, as amended, is re-enacted without change, as follows:
>
> "'SEC. 3226. No suit or proceeding shall be maintained in any court for the recovery of any internal-revenue tax alleged to have been *erroneously or illegally assessed or collected*, or of any penalty claimed to have been collected without authority, or of any sum alleged to have been excessive or in any manner wrongfully collected until a claim for refund or credit has been duly filed with the Commissioner of Internal Revenue, according to the provisions of law in that regard, and the regulations of the Secretary of the Treasury established in pursuance thereof; but such suit or proceeding may be maintained, whether or not such tax, penalty, or sum has been paid under protest or duress. No such suit or proceeding shall be begun before the expiration of six months from the date of filing such claim unless the Commissioner renders a decision thereon within that time, nor after the expiration of five years from the date of the payment of such tax, penalty, or sum, unless such suit or proceeding is begun within two years after the disallowance of the part of such claim to which such suit or proceeding relates. The Commissioner shall within 90 days after any such disallowance notify the taxpayer thereof by mail.'"

By repealing Section 1106(a) and at the same time permitting Section 1113(a) to remain in full force and effect Congress meant in the enactment of Sections 607 and 611 and in the amendment to Section 3220 of the Revised Statutes to instruct the Commissioner of Internal Revenue to credit or refund overpayments and at the same time to leave in full force and effect the right of the petitioner to file a claim for and to sue to recover a tax illegally collected.

Had Congress intended to deprive the petitioner of the right to sue to recover a tax illegally collected from him after the expiration of the statutory period it would have amended Sections 3220 and 3226 of the Revised Statutes by including

therein provisions similar to those which appear in Section 611 of the Revenue Act of 1928.

It is the position of the petitioner that his right to sue the United States for the amount of the tax illegally collected from him is conferred by Section 145 of the Judicial Code and Section 3226 of the Revised Statutes and that the only limitations on the right to sue are those contained in Section 3226, which Congress has seen fit to permit to stand as enacted in the Revenue Act of 1926.

The tax was not assessed within the period of limitation:

The petitioner filed his return on February 27, 1917, and the three-year period for the discovery and assessment of the tax prescribed by Section 9(a) of the Revenue Act of 1916, expired February 7, 1920. The tax in question was not assessed until the month of October, 1921, which was after the expiration of the three-year period and was prior to the enactment of the Revenue Act of 1921, which was approved November 3, 1921.

In the court below the petitioner contended that Section 611 of the Revenue Act of 1928 did not apply because the tax was not "within the period of limitation properly applicable thereto, assessed." The court held that Section 250(d) of the Revenue Act of 1921 was retroactive to January 1, 1921, and that the tax was assessed within the five-year period prescribed therein.

In granting the writ this Court limited the questions to the effect and validity of Section 611 of the Revenue Act of 1928. Inasmuch as Section 611 applies only in the case of a tax "within the period of imitations properly applicable thereto, assessed," the question of the timely assessment of the tax is one involving the effect of section 611 and is, the petitioner submits, properly before this Court.

Section 250(d) of the Revenue Act of 1921 provides that the amount of "taxes due under any return made under this Act * * * for prior taxable years or under prior income, excess-profits or war-profits Acts, * * * shall be determined and assessed within five years after the return was filed, * * *."

The assessment was, however, not made under nor pursuant

to the provisions of Section 250(d) of the Revenue Act of 1921 but under and pursuant to the provisions of Section 9(a) of the Revenue Act of 1916, and was therefore not valid at the time made and the petitioner submits is not such assessment as Congress contemplated in Section 250(d) under the requirement that the tax "*shall be* determined and assessed within five years."

The requirement of Section 250(d) of the Revenue Act of 1921 is that the amount of any tax due under a return for the year 1916 "shall be determined and assessed within five years." The wording of the section discloses that Congress meant to refer to those things that "shall be" done for the determination and assessment of the tax and was speaking of future and not of past determinations and assessments. The section appears in Part III of the Act which is entitled "Administrative Provisions" and in which appear those provisions of the law which relate to the routine of determination, assessment and collection of the tax by the Commissioner of Internal Revenue, and are intended for his guidance in the future conduct and administration of his office. These administrative provisions do in no sense impose a tax for the year 1916, but merely define the administrative steps that the Commissioner shall take after the enactment of the 1921 Act for the determination and assessment for the tax for the year 1916.

No legal claim in abatement was filed:

If the Court holds that Section 250(d) of the Revenue Act of 1921 is retroactive to January 1, 1921, then the petitioner submits that the claim in abatement is illegal and does not meet the requirements of Section 611 of the Revenue Act of 1928. Section 250(d) provides that a taxpayer shall be given thirty days in which to protest a proposed assessment and further provides:

> "* * * Any tax or deficiency in tax then determined to be due shall be assessed and paid, together with the penalty and interest, if any, applicable thereto, within ten days after notice and demand by the collector as hereinafter

> provided, and in such cases *no claim in abatement of the amount so assessed shall be entertained:* * * *"

The collection of the tax was never stayed:

The requirements of Section 611 are the assessment of the tax, the filing of the claim in abatement, "and if the collection of any part thereof was stayed, then, the payment of such part * * * shall not be considered an overpayment * * *." The section applies only in the case of stay and only to the extent of that part of the tax the collection of which "was stayed."

Congress has used the word "stayed" which is a word having a well defined and judicially settled legal meaning. The only meaning that the word can have is that the collector was stopped or prevented from collecting the tax. *United States* v. *Burden, Smith & Company*, 33 F. (2d) 229.

In addition to having a judicially settled legal meaning the word "stayed" is used in a taxing statute and its meaning is not to be extended by implication, for as this Court stated in *United States* v. *Merriam*, 263 U. S. 179, 44 S. Ct. 69:

> "* * * But in statutes levying taxes the literal meaning of the words employed is most important for such statutes are not to be extended by implication beyond the clear import of the language used. If the words are doubtful, the doubt must be resolved against the government and in favor of the taxpayer. Gould v. Gould, 245 U. S. 151, 153, 38 S. Ct. 53."

This Court in *Kepner* v. *United States*, 195 U. S. 100, 24 S. Ct. 797, stated that the word "bequest" having a judicially settled meaning it must be presumed that it was used in that sense by Congress. The petitioner can see no reason why the word "stayed" should not be looked on in the same light by this Court and be held to be a word having a judicially settled meaning and to have been used by Congress in that sense. Congress used the word "stay" in its strictly legal sense in both the Revenue Acts of 1924 and 1926 and is to be presumed to have used the word in the same sense in the Revenue Act of 1928.

There are no other provisions of Section 611 or of other acts

of Congress which are to be looked to to change this well defined meaning of the word "stayed." It is true that in Section 611 the words "with or without bond" appear but they refer to and modify the claim in abatement and have no bearing whatever on the question of stay. At the time of the enactment of the section Congress was aware of the fact that in certain cases collectors had required bonds with claims in abatement and in others they had not. All that Congress intended to do was to refer to all claims in abatement. It did not intend the section to apply, however, in the absence of stay of collection of some part of the tax.

The court below held that the word "stayed" is to be construed to mean a mere delay which in turn means mere neglect on the part of the collector. The court below has virtually replaced the statute by the report of the Ways and Means Committee. See House Report No. 2, 70th Congress, First Session, page 34. The petitioner submits that the court below erred in construing Section 611 with reference to the report of the Committee for the section is clear on its face and its meaning must be determined therefrom and, further, Congress did not follow the report of the Committee for instead of providing for the application of the section to mere delay Congress provided that the section should have application only in case the collection of the tax was stayed.

In order that he collection of any part of the tax may have been stayed the petitioner submits that the stay must have existed as a matter of law, of contract or of estoppel.

The law at all times here under consideration made it the duty of the collector to proceed to collect the tax and the law permitted no stay. The law was the exact opposite of stay for it specifically required the collector to proceed to collect the tax. Further, Section 3224 of the Revised Statutes provided that the collection of the tax could not be enjoined.

Article 261 of Treasury Department Regulations 33 which was in force when the abatement claim was filed reads:

> "The filing of a claim for the abatement of a tax alleged to have been erroneously assessed *does not necessarily*

operate as a suspension of the collection of the tax, or make it any less the duty of the collector to exercise due diligence to prevent the collection of the tax being jeopardized. He should, if necessary, collect the tax and leave the taxpayer to his remedy by claim on Form 46."

Article 1032 of Regulations 62 promulgated for the enforcement of the Revenue Act of 1921 reads in part:

> "* * * *The filing of a claim for abatement does not necessarily operate as a suspension of the collection* of the tax or make it any less the duty of the collector to exercise due diligence to prevent the collection of the tax being jeopardized. He should, if he considers it necessary, collect the tax and leave the taxpayer to his remedy by a claim for refund. * * *"

The court below made a special finding that the collection was held up in the discretion of the collector (R. 10). The finding is not that the collection was stayed but that the collector acted within his own discretion in not collecting the tax. The collector merely failed to exercise the due diligence required by the regulations. See Regulations 12.

The collection was at no time stayed, stopped, suspended or even delayed as the result of the filing of the abatement claim. It was held up not because of the filing of the abatement claim but because of the exercise of the discretion by or the lack of diligence on the part of the collector.

The petitioner submits that the collection of no part of the tax was stayed or delayed by the filing of the claim in abatement or otherwise but that it was merely held up in the discretion of the Collector. This is not stay.

POINT B.

TO THE EXTENT THAT IT MAY BE CONSTRUED TO APPLY, SECTION 611 HAS BEEN REPEALED BY SECTION 3220 OF THE REVISED STATUTES, A LATER ACT.

Section 611 like Section 619(b) (45 Stat. 878) hereinafter mentioned appears in and as a part of Title IV of the "Rev-

enue Act of 1928," Act of May 29, 1928, c. 852, approved by the President at 8 A. M. of that day (Public—No. 562–70th Congress) (H. R. 1). Title IV consists of certain sections of the act which modify provisions of prior acts, primarily those of the Revenue Act of 1926.

By Section 1114 of the Revenue Act of 1926, Section 3220 of the Revised Statutes, as amended by Section 1011 of the Revenue Act of 1924, was amended by adding at the beginning "Except as otherwise provided by sections 284 and 319 of the Revenue Act of 1926." The reference to Section 284 has been explained and it is sufficient here to state that Section 319 relates to estate taxes. As mentioned above, Congress by 607, 611 and other related sections of the Revenue Act of 1928, modified the provisions of Section 284 of the Revenue Act of 1926. It therefore became necessary to amend Section 3220 of the Revised Statutes, Section 1111 of the Revenue Act of 1926, to change the reference to Section 284. Congress instead of providing "Except as otherwise provided by Section 284 * * * of the Revenue Act of 1926, as amended by Section 507 of the Revenue Act of 1928 and as modified by Sections 607 and 611 of the Revenue Act of 1928" chose simpler language to accomplish the same purpose and provided in Section 619 that:

> "(b) Section 3220 of the Revised Statutes, as amended by Section 1111 of the Revenue Act of 1926, is amended by striking out 'Except as otherwise provided in sections 284 and 319 of the Revenue Act of 1926' and inserting in lieu thereof 'Except as otherwise provided by law in the case of income, war-profits, excess-profits, estate, and gift taxes.'"

That Congress was concerned merely with the effect of Sections 607, 611 and 612 and with the duty of the Commissioner to credit or refund an overpayment appears from the facts that it placed Section 619 in Title IV along with the Sections 607, 611 and 612 and gave it the title "Minor Administrative Amendments."

The purpose of Congress in the enactment of Section 619(b) of the Revenue Act of 1928, was merely to clarify the duty of the

Commissioner of Internal Revenue which was made necessary by the modification of the provisions of Section 284 of the Revenue Act of 1926 by the provisions of Sections 607 and 611 of the Revenue Act of 1928. Section 619(b) is, therefore, not to be construed to in any manner defeat or affect the right of the petitioner to the refund of a tax illegally collected or to prosecute a suit against the United States in the Court of Claims under the provisions of Section 145 of the Judicial Code and Section 3226 of the Revised Statutes.

Section 619(b), together with the Act of May 29, 1928, c. 901, Sec. 3, 45 Stat. 996, entitled "An Act to discontinue certain reports now required by law to be made to Congress," is carried into the United States Code, Supplement III, Title 26, Sec. 149, as an amendment to Section 3220 of the Revised Statutes.

"An Act to discontinue certain reports now required by law to be made to Congress" was passed by Congress subsequent to the passage of the Revenue Act of 1928, and was signed by the President on the same day, May 29, 1928 (Public No. 611—70th Congress) (H. R. 12064), but at a later hour than the Revenue Act of 1928. The petitioner submits that the codifiers erred in publishing the section of the Revised Statutes as having been amended by both Section 619(b) of the Revenue Act of 1928, and by Sec. 3, of the Act of May 29, 1928, c. 901, 45 Stat. 996. The two acts were not concurrently passed and Section 3220 of the Revised Statutes is to be considered as amended by the later act only. Section 3220 of the Revised Statutes should have been carried into the United States Code as amended and reenacted by the Act of May 29, 1928, Sec. 3, c. 901, 45 Stat. 996, as follows:

> "Sec. 3. Section 3220, Revised Statutes (title 26, section 149, page 737, United States Code), as amended, is amended to read as follows:
>
> "'REFUNDMENTS: TAXES AND PENALTIES—The Commissioner of Internal Revenue, subject to regulations prescribed by the Secretary of the Treasury, is authorized to remit, refund and pay back all taxes erroneously or illegally assessed or collected, all penalties collected without authority, and all taxes that appear to be

> unjustly assessed or excessive in amount, or in any manner wrongfully collected; also to repay to any collector or deputy collector the full amount of such sums of money as may be recovered against him in any court, for any internal-revenue taxes collected by him with the cost and expense of suit; also all damages and cost recovered against any assessor, assistant assessor, collector, agent, or inspector, in any suit brought against him by reason of anything done in the due performance of his official duty, and shall make report to Congress, by internal-revenue districts and alphabetically arranged of all refunds in excess of $500, at the beginning of each regular session of Congress of all transactions under this section.' Approved, May 29, 1928."

Section 3220 of the Revised Statutes, as amended by the Act of May 29, 1928, c. 901, refers to regulations prescribed by the Secretary of the Treasury. Section 3220, as amended by the several acts prior to the Revenue Act of 1928, has been printed in full in the regulations promulgated by the Commissioner of Internal Revenue with the approval of the Secretary of the Treasury for the enforcement of the acts. Article 1031 of Regulations 45; Article 1031 of Regulations 62; Article 1031 of Regulations 65; and Article 1301 of Regulations 69. There is, however, in Regulations 74, promulgated for the enforcement of the Revenue Act of 1928, no reference to Section 3220 of the Revised Statutes, except that Section 619 of the Revenue Act of 1928 is printed. Regulations 74 do not prescribe the manner under which the Commissioner "is authorized to remit, refund and pay back all taxes erroneously or illegally assessed or collected." Section 3220 as amended by the Act of May 29, 1928, c. 901, is not mentioned in Regulations 74. The most recent regulation with reference to the authority of the Commissioner to pay back taxes illegally collected is that in Article 1301 of Regulations 69 which reads:

> "* * * General authority for the remitting or refunding of taxes erroneously or illegally assessed or collected is found in section 3220 of the Revised Statutes * * *."

The petitioner submits that if, on reading Sections 252 of the Revenue Acts of 1918 and 1921, Sections 272 and 281 of the Revenue Act of 1924, Sections 272, 284 and 1106(a) of the Revenue Act of 1926, and Sections 1, 322, 607, 611 and 619, there should arise in the mind of the Court any doubt that the provisions of the sections constitute merely mandatory instructions to the Commissioner of Internal Revenue to credit or refund overpayments and do not in any manner affect the authority of the Commissioner to refund or the right of the taxpayer to recover a tax "erroneously or illegally assessed or collected," this doubt should be entirely dispelled by the provisions of Section 3220 of the Revised Statutes, a later act of Congress, which must be read to mean that any possible inconsistent provisions of prior acts are repealed and superseded. If the provisions of Section 611 are inconsistent with those of Section 3220 of the Revised Statutes they stand repealed by the later act.

POINT C.

SECTION 611, IF NOT REPEALED AND IF TO BE CONSTRUED TO APPLY WOULD BE UNCONSTITUTIONAL.

It is the position of the petitioner that on the expiration of the five-year period for collection prescribed by Section 250(d) of the Revenue Act of 1921 that his liability for the tax was extinguished; that the subsequent collection of the amount of the tax from him by the collector was illegal and did not transfer title thereto to the United States, but that title remained in the petitioner and the amount paid remained his property; and that, if construed to deprive the petitioner of his right and title to the amount so paid or of his right to sue for its recovery Section 611 would violate the Fifth Amendment to the Constitution.

The expiration of the five-year period in Section 250(d) of the Revenue Act of 1921 extinguished the liability for the tax.

Section 250(d) of the Revenue Act of 1921 (c. 136, 44 Stat. 227, 265), reads in part:

> "The amount of income, excess-profits, or war-profits taxes due under any return * * * shall be determined and assessed within five years after the return was filed, * * * and no suit or proceeding for the collection of any such taxes * * * shall be begun, after the expiration of five years after the date when such return was filed. * * *."

While Section 250 (d) does provide that no suit or proceeding for the collection of the tax shall be begun after the five-year period, it is, however, in the case of a tax assessed prior to June 2, 1924, within the power of the collector to proceed to collect the tax and to distrain if necessary, because Section 3224 of the Revised Statutes prohibits injunction. We are here concerned with a tax assessed prior to the creation of the Board of Tax Appeals and with the system for collection then in force. To this case the provisions of Section 274(a) of the Revenue Act of 1926 (44 Stat. 55), that notwithstanding the provisions of Section 3224 of the Revised Statutes the collection of the tax may be enjoined, do not apply.

In order to fully understand the effect of the provisions of Section 250(d) of the Revenue Act of 1921, it is necessary to consider with it and as a part of the same statutory system for the collecting and refunding of taxes, Sections 3186 to 3209 of the Revised Statutes relating to distraint and other steps to be taken for the collection of a tax, Section 3224 of the Revised Statutes which provides that collection can not be enjoined and Sections 3220 and 3226 which recognize the illegality of the collection of a tax after the expiration of the five-year period provided in Section 250(d) and confer on the taxpayer the right to recover the amount of the tax so collected. These statutes provide a period of five years from the filing of the return for the collection of a tax and provide further that the collection after such period can not be enjoined, but on payment may be recovered by the taxpayer as a tax illegally collected. Section 250(d) of the Revenue Act of 1921, is but a part of the system provided by Congress for the collecting and refunding of internal-revenue taxes.

That Section 250(d), Section 3224 and Sections 3220 and 3226 and other related sections of the Revised Statutes are to be

read together as constituting a single system of corrective justice for the collecting and refunding of taxes has been held by this Court. Chief Justice Taft in *Graham* v. *Dupont*, 262 U. S. 234, 43 S. Ct. 567, very clearly stated this principle in the following language.

> "Section 3224, Revised Statutes (Comp. St. Par. 5947), provides that "no suit for the purpose of restraining the assessment or collection of any tax shall be maintained in any court." In Cheatham *v.* United States, 92 U. S. 85, 88, 23 L. Ed. 561; State Railroad Taxes, 92 U. S. 575, 613, 23 L. Ed. 663, and in Snyder *v.* Marks, 109 U. S. 189, 193, 3 Sup. Ct. 157, 27 L. Ed. 901, it was said that the system prescribed by the United States in regard to both customs duties and internal revenue taxes, of *stringent measures not judicial*, to collect them, *with appeals to specified tribunals and suits to recover back moneys illegally exacted*, was a system of corrective justice intended to be complete, and enacted under the right belonging to the government to prescribe the conditions on which it would subject itself to the judgment of the courts in the collection of its revenues. In the exercise of that right, it declares by paragraph 3224 that its officers shall not be enjoined from collecting a tax claimed to have been unjustly assessed, when those officers, in the course of general jurisdiction over the subject-matter in question, have made the assessment and claim that it is valid.
>
> * * * It is certain that by the amendments to section 252 and section 3226, Revised Statutes, by the Act of March 4, 1923 (Public No. 527), the complainant is given the right now to pay the tax, and sue to recover it back, and in such a suit to raise the questions * * * as to the bar of time against the assessment which he attempted to raise in the bill."

The system of corrective justice that Congress has set up, in the case of a tax assessed prior to June 2, 1924, must be construed to mean that the expiration of the period for limitation extinguishes the liability but that the amount of the tax can thereafter be illegally collected with the right remaining of the taxpayer to recover it. That such is the intent of Congress clearly appears in Section 1106(a) of the Revenue Act of

1926, which the petitioner submits is declaratory of Section 250(d) of the Revenue Act of 1921.

The provisions of Section 250(d) of the Revenue Act of 1921 do not provide an ordinary statute of limitations and the doctrine stated in *Campbell* v. *Holt*, 115 U. S. 620, 6 S. Ct. 209, does not apply, for the expiration of the five-year period for collection defined in the section does not affect the remedy of the collector to make collection but extinguishes the liability for the tax.

This Court has in a number of cases distinguished ordinary statutes of limitations pertaining to remedies only from those which pertain to rights and liabilities. In *Central Vermont Ry.* v. *White*, 238 U. S. 507, this Court stated:

> "There can, of course, be no doubt of the general principle that matters respecting the remedy * * * depend upon the law of the place where the suit is brought. McNeil v. Holbrook, 12 Pet., 89. But matters of substance and procedure must not be confounded because they happen to have the same name. For example, the time within which a suit is to be brought is treated as pertaining to the remedy. *But this is not so if, by the statute giving the cause of action, the lapse of time not only bars the remedy but destroys the liability.*"

In *United States* v. *John Barth Co., et al.*, 27 F. (2d) 782, reversed on other grounds, 279 U. S. 370, 49 S. Ct. 366, the question whether Section 250(d) is an ordinary statutue affecting the remedy only or one affecting the right came before the Circuit Court of Appeals for the Seventh Circuit and in the course of the opinion the court stated:

> "In general, it may be said that statutes of limitation bar only the remedy. But the different statutory enactments on the subject of time limitations upon the determination and assessment of income taxes culminating in the Act of 1926, indicate an intent not merely to bar the remedy but to extinguish entirely all liability for the tax, where its determination and assessment is not made within five years after filing the return."

The decisions of this Court in *Graham* v. *Dupont, supra; Bowers* v. *New York & Albany Lighterage Company*, 273 U. S. 346, 47 S. Ct. 389, and *Russell* v. *United States*, 278 U. S. 181, 49 S. Ct. 121, support the position of the petitioner that the expiration of the five-year period in Section 250(d) extinguishes the liability. In the *Russell* case Mr. Justice McReynolds stated:

> "Manifestly, but for section 278 (Revenue Act of 1924), petitioners would be free from liability under the five-year limitation in the act of 1918, continued by the act of 1921. If section 278 refers only to assessments made after June 2, 1924, petitioners are not liable.
>
> "If an assessment made before that date comes within the ambit of section 278, its effect would be retroactive; and certainly it would produce radical change in the existing status of the claim against the petitioners—would extend for some five years a liability which had almost expired."

In several cases in the lower courts in which Section 611 of the Revenue Act of 1928 has been under consideration, it has been held that the provisions of Section 250(d) of the Revenue Act of 1921 affect the remedy only. The petitioner submits that the conclusions of these courts have been reached without careful consideration of the provisions of Section 250(d) and of the provisions of Section 3224 of the Revised Statutes which forbids an injunction of the illegal collection of a tax and Sections 3220 and 3226 which confer on the taxpayer the right to recover the amount so illegally collected. The petitioner further submits that the courts below did not follow the decisions of this court in *Graham* v. *Dupont, supra; Bowers* v. *New York & Albany Lighterage Co., supra, and Russell* v. *United States, supra.*

The Court of Claims in a recent case, *Mascot Oil Company* v. *United States*, decided June 2, 1930, 42 F. (2d) 309, writ granted, No. 400, held as a matter of law that "the liability for the tax still existed" after the expiration of the five-year period for collection defined in Section 250(d) of the Revenue Act of 1921. It is to be noted that the court held that the thing that still

existed is "the liability for the tax" and not the duty of the taxpayer to pay the amount of the tax after the running of the statute with the right to recover it, but the liability of the taxpayer for the tax and the right and title of the United States thereto. The effect of the decision of the court below is that Section 250(d) is meaningless and that the amount of the tax collected from the taxpayer is by right and title the property of the United States. This conclusion the petitioner submits is entirely erroneous.

While the court in the *Mascot Oil* case made no mention of any prior decision, it actually followed and applied the principle that it had laid down in *Toxaway Mills* v. *United States*, 61 Ct. Cl. 363, reversed 273 U. S. 781, 47 S. Ct. 471, that a tax paid after the bar of the statute can not be recovered from the United States. In the *Toxaway Mills* case the court stated:

> "* * * The plaintiff's contention that the act furnishes a right to recover all taxes collected after the expiration of five years from the date of the taxpayer's return presents a theory that manifestly can not be sustained *unless it be held that the limitation prescribed by the act of 1921 operated not alone upon the remedy but also upon the right* of the Government to collect and hold additional taxes after the end of the statutory limitation, even though such additional taxes were proper liabilities of plaintiff before that time. The general rule unquestionably is that the statute of limitations operates only to bar the remedy and does not extinguish the right."

The Court of Claims misconstrued Section 250(d) of the Revenue Act of 1921 and gave no consideration whatever to the provisions of Section 3224 and Sections 3220 and 3226 of the Revised Statutes. The effect of the decision in the *Toxaway Mills* case is to hold that Section 250(d) of the Revenue Act of 1921 is meaningless and at the same time to defeat the clearly expressed intent of Congress appearing in Sections 3220 and 3226 that a tax paid after the bar of the statute of limitations could be recovered as a tax *illegally collected*.

The decision of the Court of Claims in *Toxaway Mills* v. *United States*, *supra*, was reversed on confession of error, 273

U. S. 781, 47 S. Ct. 471, by the Solicitor General and should not have been followed by the Court of Claims in the case of *Mascot Oil* v. *United States, supra*, nor should it have been followed in this case.

The petitioner submits that the provisions of Section 250(d) of the Revenue Act of 1921 do not provide an ordinary statute of limitations affecting the remedy of the collector, for the collector can still proceed to collect and can distrain if necessary. The collector's remedy is full and complete and unaffected by the running of the statute. *If Section 250(d) does not affect the remedy of the collector, then it must extinguish the liability for the tax and give rise to a right in the taxpayer, to thereafter pay the amount of the tax and to sue to recover it, for otherwise it would be meaningless just as the Court of Claims held in the case of Toxaway Mills* v. *United States, supra.* That the expiration of the statute extinguishes the liability has been fully recognized by Congress in Sections 3220 and 3226, which are to be construed to mean that the collection of a tax after the bar of the statute is *illegal.*

Section 1106(a) of the Revenue Act of 1926 is declaratory of Section 250(d) of the Revenue Act of 1921:

Following the decision of the Court of Claims in *Toxaway Mills* v. *United States, supra*, and to prevent such decision from becoming a precedent for the interpretation of Section 250(d) of the Revenue Act of 1921 and of the limitation periods in other acts, Congress enacted Section 1106(a) of the Revenue Act of 1926 which reads in part:

> "The bar of the statute * * * shall not only operate to bar the remedy but shall extinguish the liability; * * *"

The purpose of this enactment was declared in Conference Report on the Revenue Bill of 1926 (House Report No. 356, p. 55, 69th Congress, First Session) as follows:

> "AMENDMENT No 170: This amendment provides that the bar of the statute of limitations against the United States and against the taxpayer shall operate to bar the

remedy and also extinguish the liability. This amendment is deemed advisable because of an opinion in a recent decision of the Court of Claims (Toxaway Mills *v.* United States, although in a case presenting the specific point this opinion very probably would not be followed by the Supreme Court. (See Taft C. J., in Graham *v.* Dupont, 262 U. S. 234, 256, 258)."

It is to be noted that Section 1106(a) is in itself not a statute of limitations but it merely refers to and defines the bar of the statute of limitations in Section 250(d) of the Revenue Act of 1921 or other applicable statute of limitations. The section does not of itself extinguish the liability for the tax but merely declares that the bar of the statute of limitations in Section 250(d) shall extinguish it. Congress referred to no particular statute of limitation and very clearly intended Section 1106(a) to refer to all statutes of limitations against the United States and to the bar of all such statutes. The petitioner submits that Section 1106(a) should be construed to apply to the bar of the statute of limitations in this case and to declare that the petitioner's liability is extinguished because of the running of the statute of limitations under Section 250(d) of the Revenue Act of 1921.

The only word in Section 1106(a), that can be used as the basis of an argument that the section should be given a prospective application only, is the word "shall." The word is, however, not used to denote time or tense but merely to give the section application to the bar of the statute of limitations as provided in other revenue acts. Congress simply declared that the expiration of the five-year period for collection in Section 250(d) shall extinguish the liability for the tax. Its legislative history mentioned above clearly shows that Congress intended the section to be merely declaratory legislation and that it should have retrospective application and be read and considered a part of Section 250(d) of the Revenue Act of 1921.

By Section 278(d) of the Revenue Act of 1924, Congress provided a limitation period of six years for the collection of any tax assessed after June 2, 1924. At the time of the enact-

ment of the Revenue Act of 1926, Congress was, therefore, not concerned with the period of limitations for the collection of a tax assessed after June 2, 1924. Congress was concerned merely with the collection of a tax assessed prior to June 2, 1924, the limitation period for which is that prescribed in Section 250(d) of the Revenue Act of 1921, which had in a great number of cases and in this case already expired.

Section 1106(a) must be construed to be retroactive or be construed to be meaningless except in rare instances. The Court's attention is further called to the fact that in the Revenue Act of 1926, and in Section 906(e) Congress conferred jurisdiction on the Board of Tax Appeals to determine whether or not the assessment or collection of a tax was barred by the statute of limitations *and for the first time gave the taxpayer the right to appear and plead the statute of limitations prior to payment.*

The petitioner submits that his liability for the amount of the tax was extinguished by the expiration of the statutory period in Section 250(d) of the Revenue Act of 1921 as defined by Section 1106(a) of the Revenue Act of 1926, and that it was beyond the power of Congress to in any manner revive such liability by the enactment of Section 611 of the Revenue Act of 1928, or by the repeal of Section 1106(a) by Section 612 of the Revenue Act of 1928.

The amount of the tax was illegally collected and title thereto remained in the petitioner:

In Sections 3220 and 3226 of the Revised Statutes, as mentioned above, Congress has clearly recognized that the collection of the amount of a tax after the period of the statute of limitations is illegal. These sections refer to a tax "illegally" collected, or in the words of Chief Justice Taft in *Graham* v. *Dupont, supra,* to "moneys illegally exacted."

The petitioner submits that the United States did not acquire the right or title to the amount of the tax so illegally collected and that therefore the amount is the property of the petitioner and the United States holds it for him merely as trustee. The

United States can not acquire title to a fund by the illegal act of a collector.

In *Christie-Street Commission Co.* v. *United States*, 136 Fed. 326, which was an action brought for the recovery of an internal-revenue tax illegally collected, counsel for the United States argued that the action was one for wrongfully exacting from the plaintiff moneys which it was not legally required to pay, in violation of the general rule which forbids the taking of property without compensation and that it was an action sounding in tort of which the court had no jurisdiction because not founded on a law of Congress. In the course of his opinion Judge Sanborn of the Circuit Court of Appeals for the Eighth Circuit clearly recognized that the plaintiff's *property was taken without "claim or color of title*, because the law implies a contract to return it or pay its value," citing *United States* v. *Great Falls Mfg. Co.*, 112 U. S. 645, 5 S. Ct. 306, and *United States* v. *Lynah*, 188 U. S. 445, 23 S. Ct. 349. Judge Sanborn reviewed the decisions of this Court in the cases of *Nichols* v. *United States*, 7 Wall. 122, 19 L. Ed. 125, *United States* v. *Kaufman*, 96 U. S. 567, 24 L. Ed. 792, *United States* v. *Savings Bank*, 104 U. S. 728, 26 L. Ed. 908, and *Spreckels Sugar Refining Co.* v. *McClain*, 192 U. S. 397, 24 S. Ct. 376, and stated:

> "* * * In each case the United States exacted moneys without right, and in violation of the general rule that the property of the citizen may not be taken without legal authority. In each case the taking was tortious."

The *Christie-Street Commission Co.* case, *supra*, was followed by the District Court in *Emery, Bird, Thayer Realty Co.* v. *United States*, 198 Fed. 242, affirmed 247 U. S. 28, 35 S. Ct. 499.

In *Atchison, Topeka, & Sante Fe Railway Company* v. *O'Connor*, 223 U. S. 280, 32 S. Ct. 216, this Court held that the amount of a tax illegally collected and retained by an official of a State was held subject to the paramount claim of the taxpayer.

Section 611 does not impose a tax but merely authorizes the retention of the amount of the tax illegally taken from the petitioner:

If Section 611 is not to be construed as merely administrative and as a limitation on the duty imposed on the Commissioner of Internal Revenue by Section 607 but is to be construed to apply to the right of the petitioner to recover by suit, then it is to be read to mean, in the words of the Ways and Means Committee, that it "authorizes the retention" of the amount of the tax illegally taken from the petitioner in the first instance and that Congress has receded from the promise made in Sections 3220 and 3226 of the Revised Statutes, as amended by the Revenue Act of 1926, to return to the petitioner the amount so collected.

Congress has not enacted a taxing statute retroactively as was considered by this Court in *United States* v. *Heinszen & Company*, 206 U. S. 370, and in *Rafferty* v. *Smith, Bell & Co.*, 257 U. S. 226, in which it was held that the right to prosecute a suit to recover a tax fell with the subsequent enactment of a statute which made the tax legal, which subsequent legislation was within the power of Congress and did not violate any provision of the Constitution. *All that this Court decided in those cases is that Congress could enact a taxing statute retroactively.* A taxpayer has no vested right not to be taxed under a statute which complies with the Sixteenth Amendment to the Constitution and a taxpayer has no right to complain that the statute was passed retroactively. The principle of the *Heinszen* and *Rafferty* cases, *supra*, does, however, not apply in this case, for the reason that Congress, in the enactment of Section 611 did not levy a tax in the exercise of its powers under the Sixteenth Amendment to the Constitution, but simply attempted to retain the amount of the tax illegally taken from the petitioner. The present case falls within the decisions in *Lincoln* v. *United States*, 202 U. S. 484; and *Forbes Pioneer Boat Line* v. *Board of Commissioners, etc.*, 258 U. S. 338. In the latter case Mr. Justice Holmes stated:

"The argument that prevailed below was based on the supposed analogy of United States *v.* Heinszen & Co., 206 U. S. 370; (Rafferty *v.* Smith, Bell & Co., 257 U. S. 226), which held that Congress could ratify the collection of a tax that had been made without authority of law. That analogy, however, fails. A tax may be imposed in respect of past benefits, so that if, instead of calling it a ratification, Congress had purported to impose the tax for the first time the enactment would have been within its power. Wagner *v.* Leser, 239 U. S. 207, 216, 217. But generally ratification of an act is not good if attempted at a time when the ratifying authority could not lawfully do the act. * * *" .

Section 611 does not merely withdraw the defense of the statute of limitations:

In the report of the Committee on Ways and Means, 70th Congress, First Session, House Report No. 2, the Committee referred to the proposed legislation in Section 611 as an Act which "merely withdraws the defense of the statute of limitations." The petitioner submits that the Committee misunderstood the statutes of limitation in the prior acts for, prior to the enactment of Sections 274(a) and 906(e) of the Revenue Act of 1926, a taxpayer had no defense to the statute of limitations because, as mentioned above, Sections 3224 of the Revised Statutes prohibited a taxpayer from raising any defense whatever to the collection of a tax even after the bar of the statute of limitations.

Section 611 does not withdraw the consent of the United States to be sued:

Congress has by Section 145 of the Judicial Code and Section 3226 of the Revised Statutes given the consent of the United States to be sued by the petitioner in the Court of Claims and the petitioner submits that the consent so given has not been withdrawn by Congress in the enactment of

Section 611. The question here involved is not the right of Congress to withdraw the consent of the United States to be sued but the right of Congress to retain the property of the petitioner contrary to the provisions of the Fifth Amendment to the Constitution.

Conclusion.

The petitioner submits that Section 611 of the Revenue Act of 1928 is merely an exception or limitation to Section 607 and that its provisions have no application because the petitioner filed his claim for refund under Section 3220 of the Revised Statutes and his suit under Section 145 of the Judicial Code and Section 3226 of the Revised Statutes and not under Section 607; that Section 607 and 611 are merely mandatory administrative provisions which apply to the Commissioner of Internal Revenue only and direct him to credit or refund an overpayment under certain conditions; that Congress has used terms and made provisions which can not be construed to apply to the right of the petitioner to sue; that Congress has used the same terms that it used in prior acts to refer to the credit or refund of an overpayment which can be made by the Commissioner of Internal Revenue only; that Sections 607 and 611 merely provide a substitute for Section 1106(a) of the Revenue Act of 1926; that Congress has neither repealed nor amended Section 145 of the Judicial Code nor Section 3226 of the Revised Statutes; and that the provisions of Section 611 do, therefore, not apply. Further, the provisions of the section do not apply to this case because no internal-revenue tax was assessed "within the period of limitation properly applicable thereto," no legal claim in abatement was filed and the collection of no part of the tax was stayed.

The petitioner submits that, to the extent that it may be construed to limit the authority of the Commissioner of Internal Revenue to remit or pay back the amount of the tax illegally collected from him or to in any wise affect his right to its recovery, Section 611 has been repealed and superseded by

the later act of Congress in Section 3220 of the Revised Statutes, as amended, by Act of May 29, 1928, c. 901 (45 Stat. 996).

The petitioner further submits that, if construed to apply to take from the petitioner his right and title to the amount illegally collected from him as a tax after the expiration of the statutory period for collection, Section 611 would violate the provisions of the Fifth Amendment to the Constitution, for on the expiration of the five-year period prescribed by Section 250(d) of the Revenue Act of 1921 the petitioner's liability for the tax was satisfied and extinguished, the amount of the tax was thereafter illegally collected and the right and title thereto remained in the petitioner and did not pass to the United States.

Respectfully submitted,

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